IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 11904 of 2000
with
SPECIAL CIVIL APPLICATION NOs.3534 of 2002 & 7034 of 2001
with
CIVIL APPLICATION NO.565 OF 2003
in
SPECIAL CIVIL APPLICATION NOs.3534 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE JAYANT PATEL

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

KV BHUNDIA

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 11904 of 2000 with SCA Nos 3534/01 & 7034/01 & CA 565/03
MR AS SUPEHIA for Petitioner No. 1
Mr.Dabhi, AGPfor Respondent No. 1

CORAM : MR.JUSTICE JAYANT PATEL

Date of decision: 06/03/2003

ORAL(COMMON) JUDGEMENT

With the consent of learned advocates for parties when the Civil Application No.565/03 is taken up for final hearing Special Civil Applications are also taken up for final hearing.

2. The short facts of the case are that the petitioner was serving as Dist.Inspector of Land Records. In the year 1980 inquiry came to be initiated against the petitioner for various charges including that the petitioner had the lawfully wedded wife-Jyostnaben Kusumakar Bhundia and without getting divorce from the lawfully wedded wife the petitioner was having illicit relation with another lady Nalini and out of the said illicit relation a daughter is borne and therefore it was alleged that the said conduct of the petitioner is resulting into immorality and is of unbecoming of a Govt servant. Another charge was that the proceedings under section 125 of Cr.P.C.were initiated by wife-Jyotsnaben for maintenance and the petitioner did not intimate the same in time to the State Govt. The third charge was that in the proceedings under section 125 Cr.p.C. there was direction to deposit the amount of maintenance but the petitioner did not deposit the amount as ordered and even if there was a decree as per the order of the court and thereby the petitionher was debtor he has not intimated to the State Govt. The 4th charge was that inspite of the direction by the Settlement Commissioner to produce the orders of the court they are not produced.

3. The inquiry was initiated against the petitioner and ultimately after the inquiry officer's report second show cause notice was issued and final order, dated 30.11.1983 was passed by the disciplinary authority whereby the petitioner was removed from service. The petitioner challenged the said order, dated 30.11.1983 of his removal from service by preferring Special Civil Application No.5876/83. The said special civil application as per order, dated 11.12.96 came to be allowed to the extent that it was found by the court that three documents were not supplied to the petitioner and therefore the court consequently passed the order which reads as under:

"In the result this special civil application succeeds and the impugned order of removal of the petitioner from service dated 30.11.1983 is set

aside and the matter is sent back to the disciplinary authority to pass fresh order after giving an opportunity of hearing to the petitioner and after furnishing the copies of those two documents and giving him an opportunity of producing his own defence. Thereafter, the matter may be decided afresh in accordance with law. Rule is made absolute in the aforesaid terms with no order as to costs."

It further appears that thereafter the documents were supplied to the petitioner, however, it is case of the petitioner that all the documents were not supplied, but the perusal of the communication, copy whereof is at annexure "E", shows that that relevant extract of the Jamnagar Municipal Corporation and other material were supplied. It appears that in the Inquiry Officer's report, dated 20.9.99 as mentioned at para 4 of the said report on 27.8.99 opportunity was given to the petitioner to examine the witness, but, the petitioner did not avail of the said opportunity and it was found by the Inquiry Officer in the said report that it is proved that the petitioner is having illicit relation with one lady, namely, Nalini and out of said illicit relation one daughter child is borne and it was also found by the Inquiry Officer that no defence is submitted by the petitioner so far as charge Nos 3 & 4 are concerned and therefore they are also deemed as proved because the petitioner has admitted that there were proceedings of criminal court for maintenance under section 125 of the Cr.P.C. Ultimately, the Inquiry Officer opined that charge Nos 1 to 4 are proved. 2nd show cause notice was issued to the petitioner on 6.10.99 and the petitioner replied to the same as per his reply dated 15.10.99. The pertinent aspect is that even in the reply to the second show cause notice it is not even the case of the petitioner nor any statement has been made to the effect that the daughter is not borne out of the relation of the lady, namely, Nalini. Ultimately, on 19.8.2000 the disciplinary authority has reconsidered the matter and found that in view of the documentary proof of the hospital of Jamnagar Municipal Corporation and Gulab Kunwarba Infant Welfare Association as proof of delivery and the names mentioned therein, it is proved that the petitioner is having llicit relation with Nalini and one daughter child is borne out of the said illicit relation. It was also found by the disciplinary authority that the charges in respect of proceedings of criminal court and the orders passed therein and non-intimation of the same to the competent authority are also proved. The disciplinary authority finally passed the order on the ground that the charges of immorality are proved and the

petitioner has already retired from service from 30.6.95 and therefore the punishment of reduction in pension for five years is imposed upon the petitioner. The said order of the disciplinary authority dated 19.8.2000 is challenged in SCA No.11904/00 by the present petitioner.

4. Special Civil Application No.3534/02 has been preferred by the petitioner challenging the order, dated 21.2.2002 passed by the respondents for treating the period from 30.11.1983 to 30.6.1995 as under suspension.

5. Special Civil Application No.7034/01 is preferred by the petitioner for promotion to the higher grade and is also for challenging the order of the respondents for not allowing the petitioner to cross E.B.

6. I have heard Mr.Supehia for the petitioner and Mr.Mehta, Ld.AGP for respondents. Mr.Supehia, Ld.advocate on behalf of the petitioner has mainly raised the contention so far as Spl.C.A.No.11904/00 is that after order passed by this court and after supplying certain documents no witness was examined before the inquiry officer. Therefore, he submitted that the evidence can not be said to be the legal evidence against the petitioner. Mr.Supehia alternatively submitted that even if the order of the disciplinary authority is taken on its face value of staying with another lady can not be said to be misconduct amounting to unbecoming of a public servant and therefore he submitted that even if the charges are deemed as proved of having illicit relation with layd-Nalini and a daughter child borne out of said illicit relation, it can be said to be misconduct in the eye of law which would call for the punishment imposed by the disciplinary authority.

7. Before I consider the submissions of Supehia on the question of examination of witness it is necessary to consider the alternative submission because Mr.Supehia has made strong efforts on the point that such an action can not amount to misconduct. It is true various conducts or norms which the public servant is required to observe while on duty may not be prescribed, but in my view for treating the action as unbecoming of a public servant the test would be whether it lowers down the image of a public servant in the society? If the charges are deemed as proved, the net effect is that the petitioner is having illicit relation with lady Nalini and a daughter child is born out of such relation. In my view, when it is admitted position that the petitioner is a Hindu, the law expects a Hindu male member to maintain marital relation with lawfully wedded wife. So far as

the society at large is concerned having relation or keeping relation as kept or having sexual relation with another lady is treated as illicit relation in the society. Had it been the case of staying together without their being any allegation of illicit relation or without their being any allegation of birth to a child matter would have been different. In the present case, the allegation is of illicit relation with a lady during the life time of a lwafully wedded wife, further with the allegation that a child is borne out of that relation. In any view, the fact that the child is borne out of the relation of the petitioner with the lady-Nalini itself is sufficient to presume sexual relation and therefore the same is also sufficient to come to conclusion that the petitioner is having illicit relation with lady Nalini. In any event holding of a post as a public servant in a society would stand on a higher pedestal than that of a common man. When such action indulged by the common man is known as immorality in society, it would reduce the value or image with some disgrace so far as the public servant is concerned. Therefore, in my view, the contention of Mr.Supehia that even if the charges are deemed as proved, it can not be said to be a misconduct can not be accepted and hence rejected.

8. Mr.Supehia has placed reliance on the judgment of this court in the matter of Bodu Tarmamad vs Dist.Supdt.of Police reported in 1988(1) GLR 101 in furtherance to his submission for contending that staying with a lady would not amount to misconduct. In the case of Bodu Tarmamad (supra) the court had only considered as to whether staying with a girl by the Govt.employee can be said to be misconduct or not. It is true that staying with any lady or a female itself could not amount to a presumption that there is any illicit or prohibited relations. Therefore, the judgment in the case of Bodu Tarmamad (supra) can not be cited as a precedent for laying down a principle that even if it is proved illicit relation or a child born out of such illicit relation it would not amount to misconduct. Therefore, in my view the said judgment in the matter of Body Tarmamad (supra) is of no help to the petitioner.

9. Mr.Supehia has also relied on the unreported judgment of this court reproduced in the matter of Karsanbhai D.Parmar vs State of Gujarat & Ors reproduced in 1986 GLT 87. Firstly, the learned judge (N.H.Bhatt,J) has made the said judgment unreportable and therefore in my view the same can not be cited as a precedent. Even if it is treated as a precedent then also in my view it does not carry the case of the petitioner further because

what is observed by the court is that unless either in the Certified Standing Order or in the service regulations an act or omission is prescribed as misconduct, it is not open to the employer to punish the workman. In the present case, it is not the contention of the petitioner that unbecoming of a public servant is not a misconduct. The contention is that such an action can not be said to be an unbecoming of a public servant. As observed earlier, in my view the action of having illicit relation with a lady during the life time of lawfully wedded wife and the relation to the extent of giving birth to a child, both can be said to be the actions which would lower down the image of a public servant in a society and as a consequence thereof it can be termed as unbecoming of a public servant which is not a misconduct and therefore the said judgment in the case of Karsanbhai (supra) is of no help to the petitioner. Mr.Supehia also relied on the judgment of the Calcutta High Court reported in the matter of Rabindra Nath Ghosh (In re) reported in 1985(1) SLR 598 in furtherance of his submission that the charges even if proved would not constitute a misconduct. On close scrutiny of the said judgment and more particularly para 7 the observations made by the Calcutta High Court are as under:

> "Merely because a person has not lived with his wife or neglected his wife or has lived with another woman can not by itself prove that such person is leading an immoral life. It is difficult to say whether on the facts and in the circumstances of the case, the conduct of the petitioner is immoral".

In the very paragraph while referring to the application made by the wife it has been observed as under:

> "In the said application, the wife of the petitioner had prayed for maintenance on the allegation of refusal and neglect on the part of the petitioner to maintain the wife and the children but in the said application there is no whisper made by the wife as regards any illicit connection with the said Sarama Bairagya."

The Calcutta further finds that:

> "The act complained of in this case can not be said to have shocked the moral concept of the society in general."

It is further observed that the wife has not made any

grievance that the petitioner was leading immoral life and therefore considering the said peculiar facts and circumstances of the case, at para 18, it was found by the Calcutta High Court that in the facts and circumstances of this case the petitioner can not be charged with gross misconduct unbecoming of a police officer involving moral turpitude. Therefore, in my view, the said judgment of the Calcutta High Court is of no help to the petitioner.

10. The aforesaid takes me to examine the first submission of Mr.Supehia that if the documents were supplied in part, no witnesses were examined and therefore it can not be said to be a legal evidence in the eye of law. The documents upon which the reliance placed by the disciplinary authority are forming part of public record, namely, the declaration which is required to be made at the time when the birth is to be registered in the hospital and the second is the record of the Hospital of a corporation. Other documents pertain to the ration card and the letter issued by the Mamalatdar. It is not the case of the petitioner that the said documents are bogus or concocted nor is the defence of the petitioner that daughter child whose birth record is produced is not out of relationship of the petitioner with lady-Nalini or that the father of the child is somebody else and not the petitioner. When such is not the defence and the authority has proceeded on the basis of public record, in my view, it can not be said that such documents would be no evidence in the eye of law. Whether the witnesses are required to be examined or not depends upon the facts of each case. The petitioner was given opportunity but he has not availed of the same. Under the circumstances, when such was not the defence, in my view, it can not be said that any prejudice is caused to the petitioner which would be required to be interferred by this court under Article 226 of the Constitution of India and hence said contention of Mr.Supehia deserves to be rejected.

12. In view of the aforesaid discussion, I find that there is no substance in the challenge made by the petitioner to the order passed by the disciplinary authority for imposing the punishment on the ground of misconduct.

13. So far as Special Civil Application No.3534/02 which has been preferred by the petitioner challenging the order of treating the period from 1983 to 1995 as under suspension is concerned, the contention raised on

behalf of the petitioner is that since the High Court quashed and set aside the order of removal, which was passed on 31.11.1983, it has been submitted that as a consequence thereof the petitioner would be entitled to backwages for the period during which the aforesaid order remained in operation. Mr.Supehia also submitted that the rules upon which the reference is made while passing the order can not be made applicable to the facts of the present case. On behalf of respondents, in the affidavit in reply filed by Mr.J.C.Pandit, Dy.Secretary, Revenue Dept, it has been submitted, interalia, that the order was passed after giving opportunity to the petitioner. It has been submitted that this court has delivered the judgment on 11.12.1996 and before that the petitioner had already retired from service on 30.6.95 and therefore the period treated as under suspension for the purpose of pensionary benefits and not others. It has been submitted that since de novo inquiry was held and the disciplinary authority has passed the order of imposing penalty there is power with the authority to treat the period as under suspension and accordingly the order has been passed.

14. The contention raised on behalf of the petitioner that since the High Court quashed the order of removal the petitioner would be entitled to backwages for the period from 30.11.1985 until the date on which the petitioner would have retired, i.e. June, 1995 appears to be attractive, but on the close scrutiny it appears that the High Court while passing final judgment in SCA No.5876/83 has not granted the said relief of consequential benefits. Further, it is not a matter where the order is set aside for all purposes on merits, but it is a matter whether on account of nonsupply of documents the order is set aside with further direction to supply the documents and to consider the matter afresh. In my view, when this court while giving adequate relief in SCA No.5876/83 has not granted the relief of payment of full backwages from 30.11.1983 to 30.6.95, it would not be open to the petitioner to seek deemed reinstatement with backwages for the said period. It is well settled that all the contentions which ought to have been raised and if they are not raised they are deemed to have been concluded by the decision made by the court on the basis of principles of constructive resjudicata. Once the petitioner accepted the judgment of this court dated 11.12.1996 in SCA 5876/83, in my view, it is now not open to the petitioner to pray for conferment of benefits which are not granted in the earlier litigation. In fact, on true construction of the judgment of this Court dated 11.12.1996 it is clear that

this court wanted the authority proceed with the inquiry after supply of documents and therefore the proceedings of inquiry are not quashed but for the purpose of considering the matter afresh and with a view to see that sufficient opportunity is given to the petitioner the authorities were directed to consider the matter afresh. Therefore, the interpretation as canvassed by Mr.Supehia of the judgment of the High Court dated 11.12.1996 in SCA No.5876/83 can not be accepted. The inquiry has proceeded further and ultimately the disciplinary authority has imposed the imposed the penalty. Once the penalty is imposed upon the employee it is within the power of the authority to pass appropriate orders for regularisation of the period during which the inquiry was subsisting and therefore I can not accept the contention of Mr.Supehia that on account of judgment of this court, dated 11.12.1996 in SCA No.5876/83 the petitioner would be entitled to full backwages for the period from 30.11.1983 to 30.6.95.

15. So far as other contention regarding applicability of rules is concerned, even if the rules and circulars which are pressed in service are considered, they are applicable for setting aside the order of removal on the basis of insufficient evidence or defective reasons or defective appreciation of evidence or for similar other reasons. Such are not the facts and circumstances of the present case. As stated earlier since three documents were not supplied to the petitioner the court found that there is no sufficient observance of principles of natural justice and therefore the petitioner was directed to be supplied such documents and the matter was directed to be considered afresh. Therefore, it is not a case of setting aside the order by the court on the basis of any insufficient evidence or defective reasoning or defective appreciation of evidence or for similar other reasons. Therefore, in my view, the authority is justified in exercising the power under Rule 152 of Bombay Civil Service Rules for the purpose of regularisation of the period from 30.11.1983 to 30.6.95. Hence, I find no substance in the challenge made in SCA No.3534/02. Mr.Supehia submitted that even subsistence allowance is not paid to the petitioner as per order dated 21.2.02 and contention was raised in CA No.565/03 that the respondents are insisting for requisite declaration before payment of subsistence allowance. In my view since the same is not subject matter of this petition, it is not necessary to express any opinion finally on this aspect but suffice it to say that it will be for the respondents to follow the procedure and it will be for the authority to comply with the order dated

21.2.02.

16. So far as SCA No.7034/01 is concerned, the contention raised on behalf of the petitioner is that no promotion was given and the petitioner was also not allowed to cross EB. In my view the prayer for promotion prior to 1983 and even permitting the petitioner to cross EB prior to 1983 are hopelessly time barred. The petitioner has not approached earlier when his juniors have been promoted. The contention of the petitioner is that earlier the petitioner had preferred SCA No.482/91 and in the said petition ultimately as per the judgment dated 18.8.81 the learned advocate appearing for the respondents stated to the effect that the adverse remarks shall not be considered while considering the case of the petitioner for promotion. After the said judgment the petitioner can not be allowed to raise the grievance after a period of 20 years and therefore in my view the prayer for allowing the petitioner to cross EB and to have promotion prior to the initiation of inquiry and even until the order of punishment was passed in the year 1983 is hopelessly barred and when the petitioner has retired from service upon attaining the age of superannuation on 30.6.95 the petitioner can not be allowed to raise grievance for his promotion for the period prior to 1983 and also for permission to cross EB. Apart from the above, in the present proceedings of SCA No.7034/01 affidavit in reply has been filed by Mr.J.N.Chaudhari, Asst.Settlement Commissioner (Inspection) on behalf of respondents and in the said affidavit at para 6 it has been mentioned as under:

"I say and submit that the petitioner had become due to cross the Efficiency Bar from 1.2.78 in the payscale of Rs.650-1200/- at Rs.810/- but the petitioner was not allowed to cross the Efficiency Bar because the attitude of the petitioner was not good. At the relevant time his behaviour with the public was not well and good. The Settlement Commissioner had informed the petitioner by order dated 27.10.78 is annexed hereto and marked Annexure "R1". I further say and submit that against the order of Settlement Commissioner dated 27.10.78 the petitioner could file appeal before the Secretary,Revenue Dept at that time but the petitioner did not file any appeal against the order. Hence, the order of Settlement Commissioner is still good. I say and submit that before giving permission to cross the Efficiency Bar the Confidential Report as well as

the conduct of behaviour of the concerned persons has been taken into consideration. For giving permission to cross Efficiency Bar guideline has been issued by the Govt by resolution dated 20.1.72 . A copy of this GR is annexed hereto and marked ANNEXURE"R2". As per the GR the confidential report as well as attitude of the concerned employee should be considered before granting the permission to cross the Efficiency Bar of the employees and in the present case the attitude of the present petitioner was not good with the public. Hence the permission to cross the Efficiency Bar has not given to the present petitioner in way back 1978."

17. Therefore, even otherwise on merits also it can not be said that the action of the respondents of not permitting the petitioner to cross EB was illegal which would call for interference by this court under Article 226 of the Constitution of India after the expiry of a period of about 20 years from the date on which the said alleged right accrued to the petitioner.

18. In view of the aforesaid discussion, I find that all the Special Civil Applications have no merit and the same deserve dismissed.

19. Mr.Supehia for the petitioner submits that in fact on account of present judgment the order passed by the disciplinary authority would remain. Therefore, the authorities may be directed to finalise the pension and gratuity of the petitioner in accordance with law. Mr.Dabhi, Ld.AGP has no objection if such direction is given to the authority. Therefore it is directed that the respondent-authorities shall consider the matter for finalising the pension and gratuity of the petitioner in accordance with law and shall take decision preferably within a period of three months from the date of receipt of writ of this court.

20. Subject to aforesaid directions, all the petitions are dismissed. Rule in each petition is discharged. Civil Application No.565/03 in SCA No.3534/02 also stands dismissed. There shall be no order as to costs.

6.3.03 (JAYANT PATEL,J)